SUPREME COURT U S

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JAMES R BROWNING, Clerk

Supreme Court of the United States

October Term, 1960

No. 329

VIRGIL WISEMAN,

Petitioner,

against

SINCLAIR REFINING COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JACOB RASSNER,
Attorney for Petitioner.

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Supreme Court of the United States

October Term, 1960

No.

—o—

VIRGIL WISEMAN,

Petitioner,

against

SINCLAIR REFINING COMPANY,

Respondent.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays this Court to grant certiorari, as he believes the Court of Appeals for the Second Circuit has applied an improper standard in taking on to itself and away from a Trial Judge, Hon. Willis W. Ritter, the very essence of a Trial Court's function, the authority to pass on the weight and sufficiency of evidence and inferences, and in addition thereto, has enunciated a new and revolutionary proposition of law, in conflict with an age old and universally accepted principle of maritime law denying to a seaman his claim for maintenance and cure.

Opinions Below

The Trial Court rendered no opinion, either orally or in writing.

The opinion of the Court of Appeals for the Second Circuit in this case is not reported.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on May 25, 1961. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Statement of Facts

Petitioner, Virgil Wiseman, was employed by Sinclair Refining Company, a corporation organized under the laws of the State of Maine, aboard the S. S. SHELDON CLARK, in the capacity of fireman/watertender. He was injured on or about the 14th day of August, 1957, while the vessel was at sea on its way from New York to Houston, Texas, off the coast of Cape Hatteras.

Petitioner had testified as follows ( ):

> "Q. Will you tell his Honor how you came in contact with any part of the ladder, how you got hurt?" (9a)
>
> "A. As I was going down the ladder I stepped on this greasy step and lost my balance and I grabbed on this other railing and swung around to catch my balance. My leg hit a bolt, about this big (indicating), sticking out. The bolt was holding a stanchion that held the ladder up. I got my balance again and I went down the ladder and went on to work." (10a)

The findings of facts and conclusions of law, signed March 29, 1961, after the appeal had been taken, were as follows:

> "FINDINGS OF FACT
>
> 1. That the defendant, Sinclair Refining Company, is a corporation of the State of Maine.
>
> 2. That during the month of August, 1957, the defendant was the owner of a merchant vessel known as the S. S. SHELDON CLARK.

3. That the plaintiff, Virgil Wiseman, was a seaman employed aboard the S. S. SHELDON CLARK during the month of August, 1957, in the capacity of fireman/watertender.

4. That there was a relationship of employer/employee between the defendant and the plaintiff herein.

5. That during the month of August, 1957, the defendant controlled, managed and operated the aforesaid vessel and had control of its appurtenances, including a certain steel engine room ladder.

6. That during the month of August, 1957, while the vessel was at sea on its way from New York to Houston, Texas, off the coast of Cape Hatteras, the plaintiff met with an accident.

7. That the cause of the accident was a slippery and greasy condition of the ladder, which caused the plaintiff to slip and fall and suffer injuries to his person.

8. That amongst the injuries the plaintiff suffered, the primary injuries were to his back and legs.

9. That the plaintiff was treated for said injuries at various times and places, as follows:

Grasslands Hospital, White Plains, New York, inpatient from October 9, 1957 to October 29, 1957.

U. S. Public Health Service Hospital, Stapleton, S. I. N. Y. inpatient from January 6, 1958 to March 5, 1958; outpatient from March 5, 1958 to March 10, 1958; inpatient from March 10, 1958 to May 8, 1958; outpatient from May 8, 1958 to October 9, 1958 to December 5, 1958; outpatient from December 5, 1958 to February 28, 1959.

10. That the plaintiff is in need of further hospitalization and surgical treatment in order to attain the maximum benefit of surgical and medical aid and attendance.

11. That the plaintiff is entitled to compensation for his injuries, including his pain, suffering, loss of wages and maintenance and cure.

12. That the plaintiff is entitled to be compensated for his pain, suffering, loss of wages, permanent injuries and maintenance and cure in the sum of $21,000.00.

CONCLUSIONS OF LAW

1. That this Court has jurisdiction of the parties.

2. That the plaintiff is entitled to judgment against the defendant herein in the sum of $21,000.00, together with the costs and disbursements of this action."

The Court below found ( ):

"Plaintiff's own testimony demonstrates his failure on several occasions in the course of his cure to seek medical attention and thus to keep the cost of his maintenance and cure to a minimum."

The Court below held, we submit erroneously, that an admission by the petitioner that he did not actually see grease on the stairway, but only on his shoe after he slipped, constituted failure of proof.

Questions Presented

1. Whether State or Federal test of sufficiency of evidence is to be applied in a case where Federal jurisdiction is invoked, which question, in substance, was left open in the case of *Dick* v. *New York Life Insurance Co.*, 359 U. S. 437, 79 S. Ct. 921, treating with a jury verdict, as distinguished from a decision by the Court in the instant case. The *Dick* case, supra, rested on diversity, as distinguished from the instant case predicated on the provisions of the Jones Act, contractual general maritime law, and maintenance and cure.

2. Does a seaman forfeit his right to maintenance and cure if he gets drunk after he suffers a seaboard accident, and thereby delays treatment for seven days?

3. Is it the function of a Trial Judge or an Appellate Court to pass upon the weight and sufficiency of inferences and evidence?

4. Is the failure to make specific findings of fact, ipso facto, a basis for vacating a judgment and dismissing a complaint?

5. Does a seaman's intoxication after an injury, resulting in delay of treatment for seven days, constitute a bar to recovery of maintenance and cure following a seaboard accident?

Reasons for Granting the Writ

1. The Court below dealt with the question of sufficiency and weight of evidence in a manner contrary to the decision by the Supreme Court of the United States in the case of *Dick v. New York Life Insurance Co.*, 359 U. S. 437, 79 S. Ct. 921, wherein this Court stated at page 927:

> "Under the Erie rule,[9] presumptions (and their effects) and burden of proof are 'substantive' * * *."

In the case of *Kirby Lumber Corporation* v. *White*, 288 F. 2d 566 (1961), the Court stated at page 573:

> "It is further established in this circuit that the quantity and quality of proof necessary to make out a case for submission to a jury in a federal court are determined by the Seventh Amendment to the Constitution of the United States, the Federal Rules of Civil Procedure and the decisions of the Courts of the United States, Revlon, Inc. v. Buchanan, 1959, 271 F. 2d 795, 800, and cases therein cited."

It would appear from the foregoing that further instruction by the Supreme Court of the United States is needed to clarify whether proof, which is "substantive" in a jury

trial as "probative facts", to be decided by the trier of the facts, not reviewable by an Appellate Court, changes its character in a non-jury action, to questions of law, reviewable by Federal Appellate Courts.

2. The Court of Appeals for the Second Circuit has applied an improper standard of law, in taking from the Trial Court on to itself, the authority to pass upon the weight and sufficiency of evidence and reasonableness of inference.

The Supreme Court of the United States in the case of *Sentilles* v. *Inter-Caribbean Shipping Corp.*, 361 U. S. 107, 80 S. Ct. 173, constitutes authority for the granting of certiorari on the instant petition, if the Court be so inclined.

In the case of *Sentilles* v. *Inter-Caribbean Shipping Corp.*, supra, this Court granted certiorari, quoting the following at page 175:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences."

In the case at bar, there was no conflicting evidence, therefore, that which the Court below called "error" might be a basis for remand, but not for dismissal.

There was no contradiction of the evidence establishing the fact that petitioner slipped on the stairway aboard ship, fell and suffered injuries.

The proof stands uncontradicted that the stairway was slippery. The shipowner called no witness to contradict the charge that the stairway was greasy, and that this condition caused petitioner to slip and fall, nor did the shipowner offer any explanation for its failure to call such witness.

The Court below applied an improper standard of review in basing its decision that the Trial Court erred in holding that the petitioner had sustained his burden of proof on inference, in the absence of direct proof as to where the grease came from.

The standard of review applied by the Court below is contrary to well established law.

We submit that the same "common sense, common understanding and fair beliefs, grounded on evidence consisting of * * * or proof of circumstances from which inferences can fairly be drawn." which is required of a jury as the basis for its verdict, constitutes ample justification for a decision by a Trial Court. This quote is from *Schulz* v. *Pennsylvania Railroad Company,* 350 U. S. 523, 76 S. Ct. 608, 610.

The standard of review adopted by the Court below is further in direct conflict with the decision in the case of *Johnson* v. *Griffiths S. S. Co.,* 150 F. 2d 224, wherein the Court stated at page 226:

> "In determining proximate cause, it is not essential that the causal connection be shown by direct evidence; the causal connection can be shown by facts and circumstances which, in the light of ordinary experience, reasonably suggests that the defendant's negligence in the manner charged operated proximately to produce the injury. 38 Am. Jr. 334.
>
> It is reasonable to conclude that the negligence established in this case was sufficient to have been the cause of the injury, if the deceased was at the point where this negligent condition prevailed."

3. The Court below has enunciated a principle of law in conflict with all prior and universally accepted authority that a seaman is entitled to the reasonable expenses of maintenance and cure until he has attained the maximum benefit of treatment, asserting, in substance, that a seaman forfeits this right if, by reason of intoxication, he delays treatment for seven days.

The law as to the basic right for maintenance and cure has been so well established by the Supreme Court of the United States that we feel it amply sufficient to mention but a few authorities.

Mahnich v. *Southern S. S. Co.*, 321 U. S. 96, 64 S. Ct. 455;
Calmar S. S. Corp. v. *Taylor*, (1938) 303 U. S. 525, 58 S. Ct. 651;
Farrell v. *United States*, 336 U. S. 511, 69 S. Ct. 707, (1949).

The duty to provide maintenance and cure finds its origin in ancient maritime law. It arises out of a personal indenture by which the seaman is bound to his ship and, in return, the vessel is bound to him in maintenance and cure. *Enochasson* v. *Freeport Sulphur Co.*, 7 F. 2d 674.

The law is well settled that a seaman is entitled to maintenance and cure during his illness, at the expense of his employer, until the seaman has received the maximum benefit of cure and treatment. *Calmar S. S. Corp* v. *Taylor*, supra; *Farrell* v. *United States*, supra.

The Supreme Court of the United States has recently further clarified the applicable law in the case of *Kossick* v. *United Fruit Co.*, 363 U. S. 838, 81 S. Ct. 886, pointing out the fact that a seaman may not refuse public health hospital service which he can obtain without charge and retain private physicians at the expense of the shipowner. The Court did not state that a delay in treatment constitutes a forfeiture of a seaman's right to maintenance and cure, which he would otherwise have but for the delay of seven days in seeking treatment.

The decision by the Court below constitutes a radical departure from well established law as repeatedly enunciated by the Supreme Court of the United States and, in addition thereto, the opinion by the Court below is in conflict with the recent decision by the United States Court of Appeals for the Fifth Circuit, *Schlichter* v. *Port Arthur Towing Company*, 288 F. 2d 801 (1961), holding that intoxication does not constitute a forfeiture of a Jones Act claim.

If intoxication constitutes no basis for forfeiture but merely in mitigation of a Jones Act claim, where the intoxication is a contributing factor to the accident, it is self apparent, without the need of argument, that intoxication, unrelated and in nowise affecting the injury, certainly constitutes no basis for setting aside the judgment by the Trial Court and dismissing a seaman's action.

4. The Court below, in conflict with prevailing authority, has enunciated a principle of law that circumstantial evidence may not constitute the basis for awarding damages in a personal injury case.

This is in conflict with the uniform decisions by this Honorable Court, going back to the old case of *The Robert Edwards*, 6 Wheat. 187, 190, 5 L. Ed. 238.

On December 25, 1957, in the case of *Rogers* v. *Missouri Pacific Railroad Co.*, 352 U. S. 500, 77 S. Ct. 443, the following appears in footnote "17", citing *The Robert Edwards*, supra:

> "17. Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence. The Robert Edwards, 6 Wheat. 187, 190, 5 L. Ed. 238."

In addition to the fact that the Court below applied an improper standard of review, the fact remains that the Court below took on to itself, we submit erroneously, the question of resolving the weight and sufficiency of

evidence, and the function to draw inferences from the facts.

When a Court takes from the finder of the facts the authority to consider the weight and sufficiency of facts, such action constitutes reversible error. *Rogers* v. *Missouri Pacific Railroad Co.*, supra; *Schulz* v. *Pennsylvania R. Co.*, supra; *Stone* v. *New York, C. & St. L. R. Co.*, 344 U. S. 407, 73 S. Ct. 358, 97 L. Ed. 441; *Carter* v. *Atlanta & St. A. B. R. Co.*, 338 U. S. 430, 70 S. Ct. 226, 94 L. Ed. 236; *Wilkerson* v. *McCarthy*, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497; *Anderson* v. *Atchison, T. & S. F. R. Co.*, 333 U. S. 821, 68 S. Ct. 854, 92 L. Ed. 1108; *Lillie* v. *Thompson*, 332 U. S. 459, 68 S. Ct. 140, 92 L. Ed. 73; *Myers* v. *Reading Co.*, 331 U. S. 477, 67 S. Ct. 1334, 91 L. Ed. 1615; *Ellis* v. *Union Pac. R. Co.*, 329 U. S. 649, 67 S. Ct. 598, 91 L. Ed. 572; *Jesionowski* v. *Boston & M. R. Co.*, 329 U. S. 452, 67 S. Ct. 401, 91 L. Ed. 416; *Lavender* v. *Kurn*, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916; *Keeton* v. *Thompson*, 326 U. S. 689, 66 S. Ct. 135, 90 L. Ed. 405; *Blair* v. *Baltimore & O. R. Co.*, 323 U. S. 600, 65 S. Ct. 545, 89 L. Ed. 490; *Tiller* v. *Atlantic Coast Line R. Co.*, 323 U. S. 574, 65 S. Ct. 421, 89 L. Ed. 465; *Tennant* v. *Peoria & P. U. R. Co.*, 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520; *Bailey* v. *Central Vt. R. Co.*, 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444; *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610; *Seago* v. *New York Cent. R. Co.*, 315 U. S. 781, 62 S. Ct. 806, 86 L. Ed 1188; *Jenkins* v. *Kurn*, 313 U. S. 256, 61 S. Ct. 934, 85 L. Ed. 1316.

> *Sentilles* v. *Inter-Caribbean Shipping Corp.* supra.; *Michalic* v. *Cleveland Tanker, Inc.*, (1960) 364 U. S. 325, 81 S. Ct. 6.

5. The decision by the Court below is in conflict with the decision by the Supreme Court of the United States in *McAllister v. United States*, 348 U. S. 19, 75 S. Ct. 6, and *Sentilles v. Inter-Caribbean Shipping Corp.*, supra.

The Court below is in disagreement with the Trial Court as to the sufficiency of the proof, although uncontradicted, to support a judgment in favor of the seaman.

Mr. Justice Frankfurter in his concurring opinion in the case of *Wilkerson* v. *McCarthy*, 336 U. S. 53, 69 S. Ct. 413, has said that " * * * since questions of negligence are questions of degree, often very nice differences of degree, judges of competence and conscience have in the past, and will in the future, disagree whether proof in a case is sufficient to demand submission to the jury" (p. 419).

Obviously, there is a difference of opinion between the Court below and the Trial Court. The difference of opinion precludes the conclusion "clearly erroneous".

In the case of *McAllister* v. *United States*, supra, this Honorable Court reversed the Court below when it took from the Trial Court, on to itself, the authority to pass upon the weight and sufficiency of the evidence.

In the case of *Imperial Oil, Limited* v. *Drlik*, 234 F. 2d 4, cert. denied, 352 U. S. 941, 77 S. Ct. 261, the Court of Appeals for the Sixth Circuit stated at page 10:

> "Not being clearly erroneous it will not be disturbed on this review. McAllister v. United States, 348 U. S. 19, 20, 75 S. Ct. 6, 99 L. Ed. 20; United States v. Standard Oil Co. of Kentucky, 6 Cir., 217 F. 2d 539, 540."

6. The decision by the Court below is in conflict with a prior decision in the Court below in the case of *Becker v. Waterman S.S. Corporation*, 179 F. 2d 713, which held at page 715:

> "If the plaintiff was also negligent in failing to see the blob of oil on which he slipped, his own negligence may reduce the amount of his recovery but is not a bar to his action."

7. The decision by the Court below is in conflict with the decision by the United States Court of Appeals for the Sixth Circuit in the case of *West Tennessee Limestone Co. v. Federal Barge Lines*, 288 F. 2d 663 (1961), and is a departure from *Rule 52(a) of the Federal Rules of Civil Procedure*, 28 U. S. C. A.

In *West Tennessee Limestone Co.* v. *Federal Barge Lines*, supra, the Court stated at pages 663, 664:

> "The questions presented here are wholly factual. Under Rule 52 (a) of the Federal Rules of Civil Procedure, 28 U. S. C. A. the Findings of Fact of a trial judge, sitting without a jury, will not be set aside unless clearly erroneous. That rule, as such, is not applicable to a proceeding in admiralty. [Rule 81 (a) (1) Federal Rules of Civil Procedure.] However, our power to review and set aside such Findings of Fact in an admiralty case is limited generally to that set forth in said Rule 52 (a). McAllister v. United States, 1954, 348 U. S. 19, 75 S. Ct. 6, 99 L. Ed. 20; Imperial Oil, Limited v. Drlik, 6 Cir., 1956, 234 F. 2d 4, 10; United States v. Standard Oil Co. of Kentucky, 6 Cir., 1954, 217 F. 2d 539, 540."

8. The decision by the Court below is in conflict with the decision by the United States Court of Appeals for the Third Circuit in the case of *Petition of Oskar Tiedemann and Company*, 289 F. 2d 237 (1961), wherein the Court stated at page 240:

> "Our standard for review of the district court has been clearly set forth in McAllister v. United States, 1954, 348 U. S. 19, 75 S. Ct. 6, 99 L. Ed. 20. Unless the findings of fact by the district court are clearly erroneous we are to accept them."

Conclusion

The enunciation of a revolutionary principle of law that a seaman forfeits his right to maintenance and cure, if he gets drunk and delays treatment for seven days, does violence to the well established and universally accepted concept of maintenance and cure.

The taking from a Trial Judge the right to pass upon the weight and sufficiency of evidence is in violation of Rule 52 (a) of the Federal Rules of Civil Procedure, 28 U. S. C. A., as so clearly and repeatedly defined by the Supreme Court of the United States, that questions of fact are not the proper subject of review by an Appellate Court.

The fact that petitioner has sustained his burden of proof in the instant case, and that the Court below was in error in holding that he failed to do so, is not of universal or general import, but the fact that the finding by an experienced Federal Court Judge that the weight and sufficiency of the evidence, and the inferences drawn therefrom, constitutes a proper basis of review, in the absence of clear error, devitalizes and renders null and void the provisions of Rule 52 (a) of the Federal Rules of Civil Procedure, 28 U. S. C. A., and its protection of judgments obtained by due processes of law.

All people of the United States have the absolute right to the protection accorded by the laws of the United States, as enunciated by the Supreme Court of the United States.

Any departure therefrom, or refusal by a lower Court to be controlled thereby, merits the granting of a petition for certiorari.

Respectfully submitted,

Jacob Rassner

JACOB RASSNER,
Attorney for Petitioner.

APPENDIX

(Opinion of United States Court of Appeals for the Second Circuit)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 371—October Term, 1960.

(Argued May 5, 1961 Decided May 25, 1961.)

Docket No. 26779

—o—

VIRGIL WISEMAN,

Plaintiff-Appellee,

v.

SINCLAIR REFINING COMPANY,

Defendant-Appellant.

—o—

Before:

LUMBARD, *Chief Judge,*
HINCKS and MOORE, *Circuit Judges.*

Defendant appeals from a judgment for the plaintiff in a personal injury action brought under the Jones Act entered in the United States District Court for the Southern District of New York, Willis W. Ritter, *Judge,* of the District of Utah, sitting by designation.

Reversed and remanded with a direction to dismiss.

VINCENT A. CATOGGIO, New York City (Purdy, Lamb & Catoggio, New York City, on the brief), *for defendant-appellant.*

JACOB RASSNER, New York City (Henry Isaacson, New York City, on the brief), *for plaintiff-appellee.*

HINCKS, *Circuit Judge*:

Plaintiff, claiming while a seaman on defendant's vessel to have slipped on a greasy ladder step and to have knocked his ankle against its guard rail, brought this Jones Act action seeking damages for negligence and unseaworthiness as well as maintenance and cure. Trial was to the court without a jury. Only plaintiff and a physician who had examined him for testimonial purposes testified. The judge found for plaintiff in the amount of $21,000, "including all three matters."[1] He made no independent findings of fact or conclusions of law, but asked plaintiff's counsel to prepare them, declining the offer of defendant's counsel also to submit findings. The findings so prepared were filed with the judgment but were not signed at that time.

The case must be reversed. The principal proof that plaintiff's back condition was related to his fall aboard defendant's vessel was the physician's testimony that sprains of the lumbar and lumbosacral spine were caused by a wrenching at the time of the accident.[2] After defendant's counsel had established that the doctor made no inquiry as to the previous history of plaintiff's back, the trial judge barred counsel from asking whether it would be possible that the condition antedated the fall. This was error. The doctor also testified that the ulcer on plaintiff's right leg was caused by the fall. After the doctor recognized a medical dictionary as a reliable authority

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[1] Plaintiff's counsel requested maintenance and cure in the amount of $5,762, damages of $16,800 for lost wages, and damages of $8,500 for pain and suffering, i.e., $30,972. Without explanation the court awarded $21,000, "including all three matters."

[2] The plaintiff, after testifying that he injured his right leg on the fall, was asked on direct examination if any other part of his body was involved. He replied: "At that time it didn't bother me, but I did have a wrenched back, but it didn't bother me at that time."

on medical terms but noted that he was unfamiliar with its definition of an ulcer, defendant's counsel was not allowed to ask the doctor if he agreed with the dictionary definition. This too was error, especially in view of the importance of the physician's testimony. *Reilly* v. *Pinkus*, 338 U. S. 269, 275; *Abrams* v. *Gordon*, D. C. Cir., 276 F. 2d 500; *Lawrence* v. *Nutter*, 4 Cir., 203 F. 2d 540, 542-43; see *Dolcin* v. *F. T. C.*, D. C. Cir., 219 F. 2d 742, 745-47, cert. denied 348 U. S. 981; but see *Shaw* v. *Duncan*, 10 Cir., 194 F. 2d 779, 783.

Plaintiff's own testimony demonstrates his failure on several occasions in the course of his cure to seek medical attention and thus to keep the cost of his maintenance and cure to a minimum. *Wilson* v. *United States*, 2 Cir., 229 F. 2d 277, 281; *Repsholdt* v. *United States*, 7 Cir., 205 F. 2d 852, 856-57, cert. denied 346 U. S. 928; *Bowers* v. *Seas Shipping Co.*, 4 Cir., 185 F. 2d 352-354; *The Saguache*, 2 Cir., 112 F. 2d 482. The plaintiff also failed to offer credible evidence to support a substantial allowance for loss of future wages. He worked for the defendant only a fortnight and there is scant clue in the evidence whether his subsequent unemployment was caused by his injuries or by lack of available work or lack of desire to work. Since it is impossible, even with the aid of the unsigned findings, to know how much of the judgment represents maintenance and cure and loss of future earnings, the entire judgment must be vacated.

More basic ground for reversal is the absence of evidence of liability. Neither plaintiff nor any other witness testified that they ever saw grease on the stair. To be sure, plaintiff said on direct examination that the step was greasy. But on cross-examination he admitted that he did not see grease there at the time; that he only saw grease on his shoe. But where that grease came from does not appear.

Reversed and remanded with a direction to dismiss.

(Judgment)

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fifth day of May, one thousand nine hundred and sixty-one.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,
HON. CARROLL C. HINCKS,
HON. LEONARD P. MOORE,
Circuit Judges.

VIRGIL WISEMAN,
Plaintiff-Appellee,

v.

SINCLAIR REFINING COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and that the action be and it hereby is remanded with a direction to dismiss in accordance with the opinion of this court; with costs to the appellant.

A. Daniel Fusaro,
Clerk.

A true copy.

A. Daniel Fusaro
Clerk

(Seal)

...RT. U. S.

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FILED
AUG 21 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 329

VIRGIL WISEMAN,

Petitioner,

against

SINCLAIR REFINING COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Opinion and Proceedings Below

The Court of Appeals for the Second Circuit in unanimously reversing the judgment in favor of petitioner rendered in the District Court after a trial to a Judge without a jury in the Civil side of the Court in this Seaman's action for alleged personal injuries and maintenance, rendered its written decision and opinion remanding and ordering dismissal of the complaint, which is reported at 290 F. (2d) 818. The opinion is printed in the Appendix to the Petition herein at pages 15-17. The appeal was argued May 5th, 1961 and decision was rendered May 25th, 1961.

The Trial Court had rendered no opinion oral or written, in awarding judgment to petitioner, nor had the District Court made any findings of fact or conclusions of law

up to the time of entry of judgment on December 8th, 1960 or for a long time thereafter (2a). Not until five days after respondent perfected its appeal to the United States Court of Appeals by filing its brief and Appendix on appeal in the Court of Appeals with proof of service on petitioner's attorney, is the Trial Court reported to have made findings of fact and conclusions of law and these obviously were made *ex parte* without notice on March 29th, 1961. These findings and conclusions were not part of the record certified to the Court of Appeals, but petitioner has set them out in full at pages 2, 3 and 4 of its Petition herein. There is serious question whether a Trial Court has power three and one-half months after judgment has been entered and after an appeal has been perfected for the first time to make findings and conclusions. Rule 52(b) of the Rules of Civil Procedure provides:

> "*Upon motion of a party made not later than ten days after entry of judgment,* the Court may amend its findings or make additional findings and may amend the judgment accordingly." (Italics added)

The so-called findings of fact and conclusions of law printed at pages 2, 3 and 4 of the Petition therefore are *dehors* the record and it is submitted, should not be entitled to consideration herein.

The Trial Court without leaving the bench, and without rendering any opinion oral or written, awarded $21,000.00 in a lump sum to the petitioner (57a). The Trial Court directed petitioner's attorney to submit proposed findings of fact and conclusions of law and denied the request of respondent's attorney to submit a brief, especially with respect to hospital records which were offered in evidence by the petitioner (53a). Proposed findings of fact and conclusions, prepared by petitioner's attorney, were submitted on December 8th, 1960, eight days after the trial concluded, but the Court refused to sign them (2a).

The Court of Appeals directed dismissal of the complaint for damages for personal injury on the ground there was no evidence of liability (Petition, p. 17) and it directed the dismissal of the complaint for maintenance and cure, because of the petitioner's indifference to his physical condition and his persistent failure properly to seek cure to respondent's detriment (Petition, p. 17).

Questions Presented

The petitioner attempts to propound five questions. Rule 23 (1e and 4), requiring a concise statement of the facts and presentation with accuracy, brevity and clearness, has not been complied with in the Petition. Upon a proper statement of the facts in this case, no question worthy of consideration by this Court will exist and in fact the propriety of the decision of the Court of Appeals will be emphasized.

Statement

In the appeal to the Court of Appeals, the whole record in the District Court was printed as appellant's Appendix. The numerals in parentheses herein unless otherwise indicated, refer to pages of appellant's Appendix in the Court of Appeals, which we assume has been filed in this Court in conformity with Rule 21(3).*

Shortly before the Court of Appeals rendered its decision, the Supreme Court had held that even a jury verdict for a railroad employee under the Federal Employers' Liability Act must be vacated if there is no evidence to support it and ordered judgment for the employer, *New York, New Haven & Hartford R. Co.* v. *Henagan*, November 21st, 1960, 364 U. S. 441.

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* Petition was served July 28, 1961. Notice of filing has been delayed.

Facts

Petitioner's suit rests on his claim that he slipped on a stairway or ladder of respondent's ship and struck his right ankle. Discussion of the claimed injury must be postponed until later in this brief. As to what occurred, no witnesses, other than the plaintiff, testified. In connection with his effort to create the impression that the stairway may have been greasy, he testified as follows on cross examination:

> "Q. You did not see any grease on the step on the *Shelden Clark,* did you? A. Not as I was going down, I didn't * * *.
>
> Q. My question is, you did not see any grease on this step, did you? A. At that time, no.
>
> Q. You did not look at the step afterwards, did you? A. I looked in my shoe. There was grease on my shoe.
>
> Q. But you didn't look at the step? A. No, I did not." (25a)

Thus, on petitioner's own testimony, both before and after petitioner allegedly slipped, he saw no grease on the steps or ladder. No one else did either.

At this non-jury trial, respondent rested at the end of petitioner's case without calling any witnesses.

Petitioner obtained employment on respondent's tank vessel on August 10, 1957 after being sent to the ship by his Union. Respondent was required to hire petitioner (19a). Petitioner signed on as an engine room employee, to wit, a fireman water tender (7a).

Petitioner testified he could not remember when he was injured, but guessed he was injured August 13th or August 16th, 1957 (19a) when the ship was off Cape Hatteras en-

route from Marcus Hook, Pa., to Houston, Texas (19a). Upon later arrival at Houston he did not sign off but sailed back to Marcus Hook. He signed off on August 22nd, 1957 and at the same time requested and obtained a master's certificate for treatment in a U. S. Public Health Service Hospital (12a). When he signed off he also signed a printed form (Ex. A, 11a) on the top of which was printed "Personal Illness Report." In longhand writing on this report, which writing according to the printing on the form is supposed to be and appears to be that of the man reporting sick, the following appears:

> "My leg keeps swelling and then the swelling going down. I have an old scar tissue that was broken open and does not want to heal. I request hospital check up. Injury on right leg."

This statement makes no mention of any accident. It says nothing about an aching back. No accident was claimed and petitioner did not sign a "Report of Personal Injury" on the form prescribed for injuries.

Hospital records dealing with the petitioner, to which we will refer later and which were offered in evidence by the petitioner (18a) contain entries that petitioner had had a varicose ulcer on his leg for from two to four years (Ex. 3, Ex. 4, Ex. 5). These records also reveal that petitioner had long been a chronic alcoholic and in 1954 had had delirium tremens. Earlier he had contracted syphilis and gonnorhea and in 1951 he suffered epileptic seizures.

Petitioner served on respondent's vessel for only twelve days in August 1957. Prior to that, his last employment had been on a river boat running from New Orleans to Memphis, Tennessee in April 1957 (19a). Before that his last prior employment had been in December 1956 on the "Chickersaw". He had served only one watch. The ship left him on the dock (20a).

When petitioner signed off respondent's ship on August 22nd, 1957 he admittedly made no effort to obtain medical or hospital care for seven days. He testified (22a):

> "Q. Where were you between the 22nd and the 29th? A. In Philadelphia.
>
> Q. What were you doing there? A. Somebody told me that shipping was good there, so I went there to see if I could catch another ship.
>
> Q. What time of the day or night was it when you went to the Marine Hospital in Stapleton, Staten Island, on August 29th? A. I believe it was about 4 o'clock in the morning.
>
> Q. Were you sober or drunk? A. I had been drinking."

The hospital record of his visit August 29th, 1957, Exhibit 3, states:

> "8/29/57 Patient has had vericose ulcer for 4 years, has no proof of eligibility, is acutely intoxicated at 4:00 A. M. Says leg is very painful for past 11 days and worse now. Leg is swollen, hot and tender. Hard to evaluate because is very drunk. Physical examination 2" varicose ulcer over right medial malleolus and surrounding area of erythema and induration. Ulcer has necrotic base. Venus cord can be palpated along superficial vein in calf and is tender to touch. Horman's negative, no calf swelling. Impression, ulcer right leg and acute cellulitis and superficial thrombophlebitis minimal. Alcoholic intoxication."

Petitioner testified the ship had given him a certificate for admission to the U. S. Public Health Hospital on August 22nd, 1957 (12a).

Thereafter from August 29th to October 9th, 1957 the record gives no suggestion that petitioner sought or ob-

tained medical care. A chronic alcoholic, he admitted that during this period he "lived" in the Bowery (23a), a well known haven for derelicts in New York. Thus on petitioner's own admission, he failed to obtain medical treatment from August 22nd to October 9th, a period much longer than the 7 days that the petitioner dwells on at pages 5 and 8 of his petition.

On October 9th, 1957 petitioner gained admission to Grasslands Hospital in Valhalla, New York. The record there shows (Ex. 4):

> "Admitted for Treatment of varicose ulcers. Patient has had varicose veins for two years. Developed an ulcer on medial malleolus of right foot 1 year ago which healed under management of private physician. One month ago ulcer re-occurred.
>
> * * * * *
>
> Patient is an alcoholic * * *. Had delirium tremens in 1954."

Page 3 says:

> "10/9—Resident's Admission Note. This pt. admitted from Surg. Clinic. Has had varicose veins for 2-3 years. Approx. 1 yr. ago noted an ulcer on Rt. ankle and soon after noted a painful cord up his Rt. leg. This has persisted and continues to cause him discomfort. His ulcer has not responded well to Rx. Also, 1 year ago he noted a mass in his L. buttock which has persisted. Exam.—1 Painful narrow cord running from R. medial malleolus to Rt. thigh along route of Saphenous vein. Chronic ulcer at Rt. medial malleolus. 2. Painless, non-tender mass of L. buttock overlying ischial tuberosity slightly adherent to surrounding tissues. Imp: L. Lipoma L. Buttock, 2. Thrombosis R. saphenous vein, 3. ulcer, Rt. medial malleolus.
>
> Antonourus, M. D."

On October 18th, 1957, Wiseman underwent a right saphenous vein high ligation and stripping in Grasslands Hospital. He also had a cyst on his buttocks removed. On October 29th, 1957 he was discharged from Grasslands Hospital.

In the period from October 29th, 1957 to January 6th, 1958 we lose the petitioner except for 3 days. On November 26th, 1957 he was examined by Dr. David H. Smith who was the only medical witness at the trial. He was not treated by Dr. Smith who saw him for the second time at the trial (30a). On December 11th, 1957 petitioner next appears at the U. S. Public Health Service Hospital and, "smelling of alcohol" was refused treatment (Ex. 3, p. 2). He next appears on January 4th, 1958 at the U. S. Public Health Service Hospital, is incoherent and smells of alcohol and is refused treatment (Ex. 3, p. 3). He received no treatment from October 29th, 1957 to January 6th, 1958.

From January 6th, 1958 to February 28th, 1959 petitioner sought and was given treatment at various times at the U. S. Public Health Hospital, Staten Island, N. Y. The hospital reports record his alcoholic sprees on January 4th, 1958, April 18th-20th, 1958, August 20th, 1958, October 15th, 1958, November 28th, 1958 (Ex. 5, pp. 117, 123, 10, 12, 45, 50, 67).

In a drinking bout in April 1958 he bashed his face and eye (Ex. 5, p. 50), and injured his ribs (Ex. 5, p. 67). On August 20th, 1958 he "was knocked on the head tonight by a wine bottle and robbed of the rest of his money $16.00. He is afraid he will go into the DT's—no real complaint except for alcoholism * * * lost his elastic stocking" (Ex. 5, p. 122).

On October 15th, 1958, petitioner was found to be suffering from alcoholism and a fractured rib (Ex. 5, p. 10). His hospital record (Ex. 5, p. 4) stated:

> "A chronic and acute alcoholic—Patient has been in the OPD (Outpatient Department) for 5 months

> and has many broken appointments, has 'lost' or sold his elastic stocking and had applied to hospital on at least one occasion for readmission altho he had not shown one bit of concern or desirability to go back to work."

The U. S. Public Health Service Hospital furnished elastic stockings to petitioner on February 18th, 1958, May 8th, 1958, August 20th, 1958, October 10th, 1958 and February 27th, 1959 (Ex. 5, pp. 115, 69, 122, 4, 127).

On this record petitioner's counsel requested an award from the Trial Court of loss of wages from August 22nd, 1957 until January 30th, 1961 (49a) and maintenance for the same period (except for those days when petitioner was in a hospital) plus pain and suffering.

The Trial Court said:

> "The judgment will be for $21,000.00 including all three matters." (57a)

None of the hospital records give the faintest suggestion that petitioner at any time made complaint of an accident or traumatic injury either to his legs or back on shipboard. The conditions for which petitioner was treated were of long standing and they antedated his employment on respondent's ship, as the hospital records show.

Petitioner for a long time had been a professional prize fighter and admittedly had skipped rope and shadow-boxed and other arduous training had imposed great strain on his legs and back for twelve or fourteen years (24a). He had 97 professional fights (25a).

Dr. David H. Smith, who testified in petitioner's behalf at the trial, never treated petitioner and saw him only once in his life before the trial (30a). Petitioner was referred to this doctor by his attorney (33a). This doctor admitted he had testified on about 15 other occasions within the year in the Southern District of New York alone

(33a). He further admitted he made no examination of the hospital records before testifying (36a). He took no X-rays (39a) and he made no interrogation of petitioner as to his background and history with respect to his legs (34a) or back (38a) before testifying. Petitioner himself admitted that he had made no complaint about his back until he had visited this doctor on November 26th, 1957 (40a). His hospital records are silent as to any back complaint. He had had a bad back for years (17a). The cyst on his buttocks he had had for 3 or 4 months prior to joining respondent's ship (26a).

ARGUMENT

POINT I

The Court of Appeals applied proper rules.

That the Court of Appeals is permitted, in fact it is required, to pass on sufficiency of evidence, clearly is indicated by Federal Rules of Civil Procedure, Rule 52(b) which provides:

> "• • • When findings of fact are made in actions tried by the court without a jury the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment."

This Court said in *McAllister* v. *United States*, 348 U. S. 19, at page 20:

> "A finding is clearly erroneous when although there is evidence to support it the reviewing Court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

This record cannot be read without reaching the "definite and firm conviction that a mistake has been committed," when the District Court awarded damages to the petitioner.

As the Court of Appeals pointed out (Petition, p. 17) petitioner himself admitted he did not see grease on the steps either before or after the instant occurrence. Proof of the presence of grease on the steps therefore was lacking. Petitioner's own illness report, signed by him, makes no reference to an accident or grease on the steps and at no time in any hospital did he make claim of an accident. Certainly by remaining in Philadelphia for seven days after signing off respondent's ship

> "to see if I could catch another ship" (22a)

petitioner does not indicate that he fell sick or was injured while in respondent's employ. Obviously he did not then consider himself unfit for duty. Nor did he obtain a Medical Certificate that he was unfit for duty.

Proof that petitioner suffered an injury or fell sick during his employment on respendent's vessel is lacking. Petitioner's own report of illness signed by him and the hospital records show that the condition for which he makes complaint was of long standing and resulted solely from his own wilful misconduct and neglect and his indifference to his own well-being. Hospital records clearly show that petitioner suffered from an ulcer on the internal malleolus of the right foot for from two to four years prior to joining respondent's ship. Even Dr. Smith, who testified for petitioner at the trial, admitted that such an ulcer, as well as the condition of petitioner's legs, could exist without trauma (38a-39a). Dr. Smith further conceded that a wound, abrasion or laceration is not an ulcer (35a). Dr. Smith testified:

> "If the wound doesn't heal up, then you get an ulcer. If it becomes chronically irritated and indurated and

infected and you get changes in the tissues, then it is possible for a wound to become an ulcer." (35a)

Thus, petitioner's leg ulcer before and after he served on respondent's ship, resulted from his failure to obtain and continue medical treatment. He brought the conditions on himself.

Instead of being diligent and seeking medical cure and treatment he aggravated his old ailments and induced new ailments and sores by neglect, indifference and chronic alcoholism.

Thus, petitioner suffered no injury on respondent's ship and any physical condition of which he made complaint resulted solely from his own misconduct.

Petitioner attempts to create the impression at page 6, that because respondent rested at the end of petitioner's case without calling any witnesses, respondent practically has conceded liability. The law is well established that uncontradicted testimony whether of fact witnesses or of experts, does not have to be accepted. *The Conqueror*, 166 U. S. 110 at 130, 133; *Dayton P. & I.* v. *Public Utilities Corp.*, 292 U. S. 290 at 299. But there was no need for respondent to call any witnesses, because the proof so clearly established that no grease was seen on the steps, that petitioner complained only of old physical conditions, which long had existed prior to his employment on respondent's ship and that after leaving it he failed, through his own wilful misconduct, to get medical attention from August 22nd to October 9th or almost 50 days, not 7 days as petitioner says. From October 29th, 1957 to January 6th, 1958, he got no treatment. Petitioner's own doctor witness condemned such neglect and indifference.

On the basis of the evidence in this case the Court of Appeals was compelled to order dismissal of the complaint. The decisions it relied on in denying recovery for mainte-

nance are in keeping with the decisions of this Court on the subject. But in addition it is apparent petitioner cannot recover maintenance for physical conditions which long antedated his service on respondent's ship and which were caused by petitioner's wilful misconduct before he entered respondent's employ and which were aggravated by his wilful misconduct after he left that employ.

CONCLUSION

It is respectfully submitted that the petition for certiorari herein should be denied.

Dated: New York, N. Y.,
August 21st, 1961.

Respectfully submitted,

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